

April 28, 2009

**OFFICE OF THE HEARING EXAMINER
CITY OF RENTON**

Minutes

APPLICANT: Wayne Potter
Barghausen Consulting Engineer
18215 72nd Avenue S
Kent, WA 98032

OWNER: David Petrie
811 S 273rd Court
Des Moines, WA 98198

Liberty Gardens Preliminary Plat/Appeal
File No.: LUA 08-093, PP, ECF

LOCATION: Southeast of 162nd Avenue SE and SE 140th Street

SUMMARY OF REQUEST: Requesting Preliminary Plat approval for the subdivision of an 8.95-acre parcel into 36 lots for the eventual development of single-family residences, with tracts for recreation, stormwater, joint use driveways and sensitive areas.
Environmental Appeal of Mitigation Measures

SUMMARY OF ACTION: Development Services Recommendation: Approve subject to conditions.

DEVELOPMENT SERVICES REPORT: The Development Services Report was received by the Examiner on March 10, 2009.

PUBLIC HEARING: After reviewing the Development Services Report, examining available information on file with the application, field checking the property and surrounding area; the Examiner conducted a public hearing on the subject as follows:

MINUTES

*The following minutes are a summary of the March 17, 2009 hearing.
The legal record is recorded on CD.*

The hearing opened on Tuesday, March 17, 2009, at 9:02 a.m. in the Council Chambers on the seventh floor of the Renton City Hall. Parties wishing to testify were affirmed by the Examiner.

The following exhibits were entered into the record:

<u>Exhibit No. 1:</u> Project file (Yellow file) containing the original application, proof of posting, proof of publication and other documentation pertinent to the review of the project.	<u>Exhibit No. 2:</u> Vicinity Map
---	---

<u>Exhibit No. 3:</u> Preliminary Plat Plan	<u>Exhibit No. 4:</u> Tree Retention
<u>Exhibit No. 5:</u> Grading Plan/Drainage Plan	<u>Exhibit No. 6:</u> Aerial Photo
<u>Exhibit No. 7:</u> Topography Map	<u>Exhibit No. 8:</u> King County Zoning Map
<u>Exhibit No. 9:</u> Project Time Line	<u>Exhibit No. 10:</u> Revised Preliminary Plat Plan
<u>Exhibit No. 11:</u> Typed Statement along with 3 Photos presented by Gwendolyn High	<u>Exhibit No. 12:</u> Drainage Report
<u>Exhibit No. 13:</u> Road Classification Map	

Ann Nielsen, Assistant City Attorney had some preliminary issues to discuss: Mr. Watts was present and would testify during the Appeal portion of this hearing. The reason for requesting the Preliminary Plat portion to be heard first is to have the testimony heard in that hearing incorporated into the relevant part of the Appeal Hearing. There were no objections by the applicant. Relevant portions of the King County Ordinances and Comprehensive Plan were offered to the Hearing Examiner. This project is vested to King County Development Standards, but it is the City's position that procedural rules of the City of Renton apply.

A new copy of the appeal, which contains the streamlined specific appeal issues was presented. The appeal now has only three issues.

The hearing opened with a presentation of the staff report by Rocale Timmons, Associate Planner, Community and Economic Development Department, City of Renton, 1055 S Grady Way, Renton, Washington 98055. The site is located in northeast Renton, just south of NE 4th Street (SE 128th Street) along the eastern border of the City. The site is located on the 14100 block, 162nd Ave SE is on the west and 164th Ave SE is on the east. The site is located in King County and City of Renton R-4 zoning district. Both streets along the frontage of the site are unimproved. There is a pending plat just north of the site, Cavella.

Ms. Timmons went through the Project Time Line with appropriate dates of events in relation to this plat. Environmental Review Committee issued a Determination of Non-Significance-Mitigated with 6 measures relating to erosion control, drainage, mitigation fees and monitoring for wetland and stream impacts. One appeal was filed by the applicant, which is before the Examiner today.

The site is zoned R-4 and the Comprehensive Plan designation is Residential-Low Density. However, the project is vested to the 2004 R-4 development standards and the Urban Residential Comprehensive Plan Designation of King County. It is the City's position that the annexed properties are not vested to rules and procedures of the King County Code and that the project, once annexed, would follow the rules and procedures outlined by the City of Renton code.

The proposed density for the plat would be approximately 4/du per gross acre, the lots range in size from 5,900 square feet to approximately 9,300 square feet. Access to the lots was originally proposed via 162nd Ave SE with three new internal streets extended from 162nd Ave SE. There are no minimum lot size or depth requirements in the King County R-4 zone, however the minimum width requirement is 30-feet. The proposed lots would meet the width requirements.

The proposed lots appear to provide adequate area to meet front, side and rear setback requirements. All setbacks would be verified at the time of building permit review. There is also adequate area to provide off-street parking of two spaces per each lot.

The site is heavily wooded and contains 266 trees of which 8 are proposed to remain. The applicant is in compliance with the County's tree retention requirements. A final tree retention plan will be required prior to utility construction.

The landscape plan indicates the installation of 48 trees placed in the front yards of the lots along the interior roads to the site. In addition to street trees, 91 of the 109 replacement trees are being used to buffer the site along 164th and the southern border until the sensitive areas tract is reached. The sensitive areas tract includes a Class III stream as well as a Class II wetland. A detailed landscape plan will be provided and approved prior to plat recording.

King County requires 390 square feet of recreation space per lot be provided on site, the applicant has proposed recreation space within Tract B, which is also the drainage tract in the amount of 20,200 square feet. In addition the applicant has proposed a tot lot, sports field, and a sports court to comply with additional King County Code requirements.

The site is fronted on the east and west by unimproved rights-of-way. The only access to the site is via 164th Avenue SE, due to impacts and distances from improved streets, the applicant was required to provide two points of access suitable for domestic, emergency and pedestrian safety. Originally the access would have been from 162nd Ave SE, which the applicant proposed to make half street improvements on 162nd from the 13800 block south to SE 144th Street. Staff has since recommended that there be an east/west road connection. The applicant has submitted a revised preliminary plat plan that shows entering the plat from 162nd and continuing east to 164th, which road would be designated SE 140th Place. This new road does not affect lot count. As part of the revised drawing the applicant would make half street improvements to 164th Avenue SE, which is currently 30-foot wide. As previously mentioned, 162nd Ave SE is encumbered by two separate wetlands plus a Class III stream. The applicant has requested a variance to modify the street frontage improvements to 162nd Ave SE. Development Services Division would review and make a recommendation following the preliminary plat hearing.

A Transportation Mitigation Fee was imposed on this project. School impact fees would also be required.

The proposed project site has an average slope of 15 percent; with an elevation change of 46 feet from the southwest quarter to the northeast quarter of the site. Drainage currently runs off from the northeast portion of the site to the Class III stream, water then flows southeasterly to the eastern side of 162nd Ave SE and discharges into sheet flow to the south within the unimproved 162nd Ave SE right-of-way to SE 144th Ave intersection where it then flows by culvert/pipe to the Cedar River and then to Lake Washington.

The applicant would collect stormwater runoff and convey it into a proposed stormwater vault located in Tract B. The outfall would be conveyed back into the stream channel and leave the property. The applicant has proposed using the 1998 King County Surface Water Design Manual, however the applicant has submitted a Level III downstream drainage analysis, which identifies several drainage problems. The ERC required the applicant to use the 2005 drainage manual for both detention and water quality improvements.

The site is served by Water District 90. The property is currently served by public sewer, extension of the existing sewer line would be required to serve the new plat.

Hans Korve, DMP Engineer, 726 Auburn Way N. Auburn, 98002 stated that he would be doing the majority of the speaking. Wayne Potter and Dan Balmelli from Barghausen, and Gary Norris a traffic consultant were also present representing the applicant.

The new design addresses many of the issues; the primary access comes south along 162nd entering the site at SE 140th with a second access as required to 164th. This was done to meet the needs of the community and to provide a better product for future buyers. They are working with a new plat to the north, Cavella to provide improvements and secondary access to the entire area. Cavella has agreed to extend 164th to the north.

The Examiner stated that if this project were to be developed first, there must be a public access that serves Fire and Emergency Services as well as the residents. If Cavella fails to develop, then this project would be responsible for developing that road in its entirety.

Mr. Korve stated that they understood that completely. This is a private agreement between the three developments, Liberty Gardens, Cavella and Threadgill. This agreement came about because all three projects needed secondary access in order to do improvements in this area. All three agreed to share the costs of doing the needed improvements on a per lot basis. They believed that the improvements made would eliminate most of the CARE concerns.

Drainage issues will be addressed during the SEPA appeal.

The Examiner stated that drainage would be needed for this project and while SEPA is out there, he needs to know what the proposed drainage is, and what improvements have been made.

Mr. Korve stated that this project is perfectly self sustainable with the 1998 Manual Level III as proposed. King County agreed that the 1998 manual is more than adequate to address the issues. The report was provided as a group review for all three projects. The other two projects are not vested to the 1998 manual, so when Mr. McCarthy did his review it would have been useless to review to a standard for all three that only applied to one. When Mr. McCarthy did the overall review, he used the 2005 manual, did the analysis and made his representations. Mr. McCarthy was out of town and unavailable to be present at the hearing. His findings were in no way intended to be taken in the context that somehow the 2005 manual must apply to this project. That was never his intent and not what his conclusions meant to say and if that is what was understood, he apologizes. That was not his intention.

10:04 am: 10 minute break was taken.

Dan Balmelli, Barghausen Engineers, 18215 72nd Avenue S, Kent 98032 stated that he is the project engineer for both the Liberty Gardens and Cavella projects. They also coordinated with the Threadgill project, which is further to the north, the three projects in conjunction hired Mr. McCarthy to complete a detailed Level III drainage analysis. All three projects had the same downstream drainage issues. A portion of the Threadgill project drains to the same basin. It was beneficial to all three projects to have one study done to analyze the downstream system. Mr. McCarthy modeled the project in existing conditions and developed conditions; came to conclusions as to what the extent of the problems are and recommend options for either correcting the downstream problems or to provide on-site mitigation so the downstream conditions are not exacerbated. On page 3.1 of the study, the mitigation options are outlined; provide on-site detention to King County Level III flow control standard, some other options included downstream improvements, some conveyance system upgrades, and some improvements to the water quality system.

The three parties all agreed to provide Level III on-site detention, King County reviewed this option and agreed to the mitigation. At that time it was proposed to extend 162nd from the project site to 144th, there is an existing

conveyance ditch and stormwater pond within the right-of-way. With the construction of the roadway, the pond would have been eliminated. It was agreed that that portion of the roadway would be tightlined to provide more room for the road. Now that 162nd is not going to be extended to 144th the roadway would not require modifications and so the tightlining of the drainage channel is no longer required. This project should be approved under the 1998 standard.

Gwendolyn High, CARE, PO Box 2936, Renton 98056 (home: 155 Yakima Ave NE, Renton 98059) [a copy of these minutes and decision will be sent to both addresses]

The following concerns are focused on KCC 21a 24, they are details that were not previously elaborated on:

-Vegetation Management Plan, there is a requirement for protection of sensitive areas, the site is heavily wooded with 266 significant identified trees of which 8 trees are proposed to be retained. There is no indication regarding the logging practices.

The Examiner questioned the trees to be retained.

A temporary erosion and sedimentary plan would be required, the code does allow the logging practices to be incorporated. They asked that that be required.

-Building setback requirement of 15 feet from all edges of all sensitive area buffers with the exception of impervious ground areas such as driveways and patios may be allowed, subject to special drainage provisions. The west terminus of SE 141st Place cul-de-sac and the driveway of Lot 28 are immediately adjacent, they are the boundary of the wetland buffer for Tract A. There is zero building setback and as such would require adherence to the King County 2005 drainage manual.

-As far as they can tell, the access route for the sewer has not been determined, it may have been slated to come up 162nd. If it were still proposed to be run through the unimproved right-of-way of 162nd Ave SE code would prevent that, the sewer would have to go through the wetland buffers.

-Mr. Foley stated in an earlier email that if the County were to consider a capital project on SE 144th the size, cost and complexity suggest that it would take years for it to be built. Some more limited downstream improvements by the developer might make more sense than an uncertain King County project. A downstream fix seems to be more feasible. This appears to support staff's requirements to using the 2005 Manual.

-They were pleased to see that the applicant has proposed access to the site from the south via 164th, it does address quite a lot of the outstanding issues. There are general issues that still exist, there has been no consideration of the traffic flow patterns from the Alpine Nursery. The Transportation Impact Analysis did not consider any of the impacts along 144th, there was no intersection analysis presented. It appears that the TIA should be redone particularly with such significant impact that can be expected on 144th and the traffic issues there. In light that 136th would be the other main access, the intersection of 136th at 156th was the road that was required as a condition of the earlier plats in order to mitigate the impacts of SE 128th Ave and 160th Ave SE. To help that situation, King County required this new road from 160th to 156th, there was a failing level of service at the intersection of 136th and 156th. With the occupation of some of the new developments, traffic signals were needed and have been added and their classification is now that of an arterial.

-Further concerns were with a sidewalk on 162nd there are sections that have sidewalk and sections that do not. There are some issues with people attending events and sporting events that are parking in that area with new drivers, insufficient lighting and no walkways and they would like to have curb, gutter and sidewalk along the entire length of 162nd.

-It appears that the improvements along 164th would be only half street improvements. It can be expected that there would be more parking along that street as well. In the dark, inexperienced drivers with an inadequate

parking situation, they would like the staff to review this area and make sure that they have public improvements to meet the actual public needs.

-Two further things that the TIA did not consider are the two projects in the King County Transportation Needs Report for pedestrian improvements on 144th. There also is no walkway indicated on the map seen today from the eastern terminus of SE 144th cul-de-sac to the middle school. Previously there was a walkway proposed and it does not seem to be on the map now.

Mr. Korve stated that that walkway was omitted when the new internal roads were designed.

Ms. High continued with regard to the possibility of increased parking and access to the high school ball fields and the park near 164th Ave SE. King County agreed that the increased parking and access to the high school would make the TIA's so far submitted obsolete.

Patricia Payne-Gammell, 16043 SE 142nd Place, Renton 98059 stated that she resides just southwest of the subject site. A group of neighbors filed an appeal on the extension of 162nd to the south because of the large ditch that travels down the right-of-way and joins the ravine of the plat and comes back into the drainage ditch on 162nd. Most of the concerns in the appeal have been taken care of if the extension of the road is not permitted. They are concerned about the impact of the drainage ditch and any of the site water that might enter this drainage ditch. The subject site is north of Mr. Moore's property (the western large lot at the southwest corner of the subject site), the Class III creek flows across the subject site, enters Mr. Moore's site and swings back to the west toward 162nd street, and if any water is added to this small ditch, it would overflow and flood the corner Mr. Moore's basement.

Gary Norris, PO Box 547, Preston 98050 stated that he is the traffic engineer representing the applicant. He prepared the Traffic Impact Analysis for Threadgill, Cavella and Liberty Gardens. The date on the report was October 2006, conditions and times have changed and development proposals in the area are increasing and would have impacts on any analysis that would have been done at that time. This Traffic Analysis was not required as part of the typical requirements of King County. The relevant section of the King County Code would be the Intersection Standards, which requires a development that is impacting an intersection by 30 or more pm peak hour trips to conduct an analysis and determine appropriate mitigation. None of the three plats involved in this analysis met that requirement individually. The County did ask the development to provide this analysis to facilitate an evaluation of the impacts of the projects on the high accident locations and the evaluation of the potential extension of SE 136th street from 162nd over and across to 168th Avenue. That was the basis of the analysis done.

In no case was there any consideration that the mitigation that would be required for impacted intersections or deficient level service standards, those were all accommodated through the concurrency and the MPS system elements of the King County Code. The effect of this document was to evaluate and determine that a secondary access would be beneficial to addressing the impacts to the high accident locations. Subsequently the desire to extend 162nd and now the connection to 164th was a result of this analysis.

In terms of the King County requirements, there would be no need to redo or update the Traffic Analysis. This plat does not generate more than 30 p.m. peak hour trips through a specific intersection.

Concurrency is the King County analysis for different zones throughout the King County arterial network which they maintain on an ongoing basis. The concurrency analysis is constantly being updated with the new development as it occurs. At the time of this application, they were concurrent and so they were allowed to proceed. A development is not allowed to proceed through the review process if it does not meet concurrency. If concurrency standards changed, it would not affect this project because it was already vested into the system.

If the system should become non-concurrent the impacts of this plat have already been considered and is included in that analysis, it is still vested and concurrent as long as the application continues to move forward. If the application drops, then it drops out of the system and the applicant must reapply.

The high accident locations have been identified as being along 160th at SE 128th, 162nd Ave SE at SE 128th and 164th Ave SE at SR900.

Neil Watts, Director Development Services stated that he had reviewed the files and all the included reports. Typical trips made from a single family house peak hour are one per house that would mean 36 peak hour trips from this site. A real quick estimate of distribution would show approximately 70% of the trips going north and 30% would be heading south, which after doing the math that would be below the threshold.

The street design requirements become somewhat complex due to several projects with similar requirements and overlapping requirements. Code requirements would be all adjacent right-of-ways, 162nd, 164th, all the interior streets with curb, gutter and sidewalks. On the adjacent existing streets the code would be half street improvements. The King County standards allow the reviewing jurisdiction to do some level of off-site improvements, this project would also require the extension of 162nd to the north to 137th Place with half street improvements of curb, gutter and sidewalk along one side of the street. The new interior streets would need to be fully paved with curb, gutter and sidewalks on both sides of the street.

In the City of Renton, there are no variances for street modifications, they do modifications, this would be a modification and not a variance. This would typically be done as a staff modification prior to the hearing, however, since they did not have this particular submittal they have not done that. If the Examiner elects to keep the record open, they would provide a written modification from staff addressing 162nd and would be able to support that modification for any type of roadway improvements south SE 140th Place. That would be contingent of no driveways coming off of that street.

They would request a condition that no driveways be provided to any of these lots so that there would be no driveway access from either 164th or 162nd, all driveways would access from the internal streets. There have been some concerns about parking on 164th, there will most likely be some parking on that street with people going to playfield facilities at the high school. There would only be parking on one side of 164th.

In working with the project to the north the intent is to continue the extension of 164th to the north to the end of the other development site. Beyond that the lots are already developed and there does not appear to be an opportunity to extend the road beyond that point.

The sewer would be extended up 164th.

Regarding the King County Manual, for a fully wooded site such as this site appears to be no difference in amount of detention or water quality requirements between the '98 manual and the 2005 manual. However, there are some procedural differences between the two manuals, there also is a broader range of options that are allowed in the 2005 manual. The 2005 manual is also closer to being consistent with the City's NPDES requirements. It was strongly recommended that that condition be kept in place. The City's policy for the east plateau area has been for everything to go to the highest level of requirements available, which is the 2005 Manual. There are downstream drainage impacts from this site and this community has identified what the acceptable realm of environmental impacts for drainage is in this area. The 1998 Manual does not suffice for proper environmental protection for these community standards.

Staff would not oppose the Hearing Examiner making this a plat condition.

Regarding the Issaquah School District Impact Fee, in the body of the report it was listed to be paid at the time of building permit. The Impact Fees are, however established by City Code and code specifies that those fees are to be paid at building permit stage. (Condition #7)

They also recommended that the street design include a pedestrian linkage between the most southerly cul-de-sac over to 164th. Tract E was previously located between proposed Lots 18 and 19 and with the new interior roads, that access would now be located between Lots 19 and 20.

They do recognize that there are challenges in this neighborhood as it develops and with the existing intersections, as the volumes increase there will probably be a likelihood for more accidents. The City will continue to make adjustments as they can. The purposes of the Traffic Mitigation Fees are to do the offsite improvements. There are some challenges for the intersections and pedestrian walkways.

Regarding the missing gap on the sidewalk on 162nd, this project should be conditioned to bring the sidewalk all the way up to 137th. The streets in this area have lots of capacity. Most of the time the level of service on these streets would be A, there may be times in the day that they would come down to B or C. On 164th it will be Level Service A and it will remain that level of service. The neighbors are used to seeing very few cars on that street, with the change of the roadway system, the new development and the development to the north, they will see a significantly higher percentage of cars on these streets. These are acceptable levels of service and acceptable capacity to accommodate this development. No offsite improvements are being recommended.

Doris Yopez, 16444 SE 135th Street, Renton 98059 stated that she lives north of Liberty High School and she walks all around that area. She has walked on 164th from Liberty High School where the ball fields are located. Back of the ball fields there is a dirt path that goes through to 164th, she was wondering what kind of improvements would be made in that area, there are a lot of students that walk in that area.

There is a development called Starwood there is a lot of erosion and ruts in the path. The path has become so eroded with large ruts that it is now useable, there is a lot of water coming down that direction now.

The Examiner stated that the dirt path would become a half street with a curb, gutter and sidewalk on the west side.

Mr. Korve stated that the Liberty Lane sidewalk extension to the north according to King County does not require offsite improvements of curb, gutter and sidewalks, they usually do the fire access, the appropriate amount of pavement and then a shoulder. They request that they be held to the vested road standards for offsite improvements.

There was some discussion as to improvements to the roadways, some would require full City standards, there may be some agreements between this project and Cavella, but if a secondary access is necessary, then this project must provide that road. That means that this development would be responsible for not only a pathway but actually a real sidewalk, curb, street and gutter in that location.

Mr. Korve stated that it is the offsite portions, the areas not fronting this project under the King County road standards, once you leave your site, the level of improvements drops from the full urban frontage, which is the project's responsibility, to a lesser standard of safe walking. You still have to provide extended gravel or an 8-foot paved shoulder or something like that.

The Examiner stated that 162nd would have to be developed up to SE 137th Place. There needs to be fire access, domestic access and pedestrian access.

Mr. Watts stated that there were a number of ways to cost share.

Mr. Korve stated that with the clarification, they are in total agreement.

The subject of re-introducing Tract E was proposed, the applicant would oppose such a condition on the basis that there is no need for this pedestrian connection now that 140th Place has been extended. Any children walking to or from the park or school would be going north and it is a short distance to go along the interior sidewalks. There is the security factor as well.

Dan Balmelli stated that regarding the drainage concerns of CARE, first, a portion of the email from Steve Foley bringing up the potential for the offsite mitigations. Those were discussed with the County's staff and that was just some of the comments from Steve and the County staff, as a result of the final proposal and the complexity of the possible offsite proposals, they chose to propose the Level III, the County staff all reviewed and agreed to that mitigation and it became a condition. That issue has been addressed adequately.

Second, the concern with 162nd, since 162nd has been eliminated most of CARE's concerns also have been removed. Their drainage will discharge into the channel at a very reduced and restricted rate under the Level III detention, it will re-enter the drainage channel and the existing pond further south of where most of their concerns with Mr. Moore's property. They are not required to mitigate for existing conditions.

Rocale Timmons had three items: 1. Pedestrians and potential students might not only travel north to Liberty High School, they might also travel south of 144th to the high school and elementary school in this area. 2. The applicant made reference to the building setbacks for the sensitive area tract. King County Code specifies that the driveway or access be setback 15-feet, but that special drainage considerations must be made for those areas or driveways that are abutting within that 15-foot setback. 3. Regarding the wetland at the NW portion, assuming that the southern portion of 162nd Ave SE is foregone, the applicant will need to submit a revised mitigation plan for impacts to that upper Class II wetland and buffer.

Hearing was adjourned at 12:00 for lunch
Hearing resumed at 1:30 pm

The **Examiner** called for further testimony regarding this project. There was no one else wishing to speak, and no further comments from staff. The hearing was adjourned for lunch at 12:00 p.m.

FINDINGS, CONCLUSIONS & RECOMMENDATION

Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. The applicant, Wayne Potter, Barghausen Consulting Engineer, filed a request for a Preliminary Plat.
2. The yellow file containing the staff report, the State Environmental Policy Act (SEPA) documentation and other pertinent materials was entered into the record as Exhibit #1.
3. The Environmental Review Committee (ERC), the City's responsible official issued a Determination of Non-Significance - Mitigated (DNS-M).
4. The subject proposal was reviewed by all departments with an interest in the matter.

5. The subject site is located along portions of undeveloped rights-of-way. It is generally northeast of the intersection of 162nd Avenue Southeast and SE 142nd Street if those streets were extended. The eastern boundary is 164th Avenue SE if that street were extended.
6. The map element of the Comprehensive Plan designates the area in which the subject site is located as suitable for the development of single family uses, but does not mandate such development without consideration of other policies of the Plan.
7. The subject site is currently zoned R-4 (Single Family - 4 dwelling units/acre). The subject site is vested under King County's zoning which is generally equivalent to Renton's designation but the standards for lot area, yard setbacks or dimensions and development standards would be judged against King County standards in effect when the application was submitted on December 29, 2004.
8. The subject site was annexed to the City with the adoption of Ordinance 5398 enacted on August 11, 2008.
9. The subject site is approximately 8.95 acres of 389,862 gross square feet. The subject site is approximately 655 feet wide (east to west) by 594 feet deep.
10. The subject site slopes downward from the northeast to the southwest with an average slope of about 15 to 20 percent. A Class II wetland and Class III creek are located in the southwest corner of the site. A Class II wetland is located offsite to the northwest.
11. The Class III stream requires a 25 foot buffer since it is non-salmonid bearing. The wetland requires a 50 foot buffer which encompasses the stream and stream buffer. In order to protect these critical areas the ERC required that they not be available for separate sale and that each abutting owner or the Homeowners Association have an undivided interest in the property. A 15-foot building setback line was also established from the edge of the preserved areas.
12. The tree inventory found approximately 266 significant trees on the subject site. The applicant proposes retaining approximately three percent of those trees and planting an additional 157 trees.
13. The applicant proposes dividing the subject site into 36 lots and 6 tracts. The lots would range in size from approximately 5,900 square feet to 9,350 square feet.
14. Access would be provided by 162nd Avenue along the west boundary of the site and then by three new internal roads. Proposed SE 140th Place would run east into the site and terminate in a cul-de-sac. Prior to the cul-de-sac 163rd Avenue SE would branch off to the south and that in turn would intersect with Proposed SE 141st Place that would run east and west with both ends terminating in cul-de-sac turnarounds.
15. Proposed Lots 1 to 8 would run east to west across the north property line generally north of Proposed SE 140th Place. Proposed Lots 9, 10, 11 and 17 to 21 would be located along the eastern property line with access via two cul-de-sacs and pipestems or easements. Proposed Lots 28 to 36 would form a two-tier block of lots in the west central area of the plat. The remaining lots would be clustered around the cul-de-sacs east and south of 163rd and 141st, respectively.
16. Staff has recommended that SE 140th Place be continued to the east as a through-street that would connect to 164th Avenue SE. An exhibit was submitted showing that roadway extended across the site. The lot count would remain at 36 even with the roadway extension.

17. Code requires the planting of one tree for every 40 feet of street frontage. That would be approximately 48 trees but might change if additional roads are developed as proposed by staff. The applicant proposes additional tree plantings in the drainage/recreation area.
18. The density for the plat would be approximately 4 dwelling units per acre using King County standards.
19. The subject site is located within the Issaquah School District. Developments within that school district are required to pay an impact fee on a per lot basis. The fee is accessible at the time of building permit approval and is \$6,021.00 per lot.
20. The development will increase traffic approximately 10 trips per unit or approximately 360 trips for the 36 single family homes. Approximately ten percent of the trips, or approximately 36 additional peak hour trips will be generated in the morning and evening. Traffic analysis indicates that intersections can handle the additional traffic. King County's applicable concurrency standards do not require changes in the proposal or more specific traffic analysis since no one intersection will handle more than 30 afternoon/evening peak hour trips. Staff recommended that the applicant pay the City's mitigation fees for traffic. King County does require the identification of "High Accident Locations" (HAL) and they were identified. To help moderate impacts the City has recommended that traffic be better dispersed by opening a connection through the plat to the east, to 164th. This would allow traffic to flow out of the plat along two roads rather than just the western 162nd. Separately, the applicant has entered into an agreement with two other proposed plats in the area for joint development of access road 162nd. Staff has recommended that the roadways meet the King County standards although a modification or variance may be appropriate.
21. Stormwater control is an issue for the subject site. There are existing flooding problems that were identified in the *SE 144th Street Level 3 Downstream Drainage Analysis* (McCarthy, June 15, 2007) and his subsequent mitigation suggestions (March 3, 2008). Those two documents discussed and recommended Level 3 Flow Controls and references are to standards in the 2005 Design Manual. See a fuller discussion in the companion SEPA Appeal Decision issued as part of this concurrent Plat and Environmental review. Driveways are overtopped by stormwater and third party property floods serving as a de facto stormwater detention pond during storm events. Stormwater would be contained in a vault on Tract B and then directed back to its natural channels, the creek and wetland.
22. Sewer service will have to be provided to the proposed plat. A 15-inch line is located at the intersection of 160th Avenue SE and SE 144th Street and a 12-inch line is located in 160th. An 8-inch line meeting City standards will be required.
23. Water District 90 serves the site. A domestic water line will have to be extended to serve the site.
24. Neighbors were concerned about traffic and stormwater impacts of this development on the surrounding community. There was concern about parking and impacts on the school. Flooding, identified above, was an issue. The natural features and trees were also presented as an issue.
25. The applicant noted that the McCarthy drainage documents were prepared for three projects including the subject application. They maintain that it does not mean that the recommendations in those documents for imposition of 2005 Design Manual are applicable to the subject proposal, only that it was not practical to separately address the needs of each project based on its own vesting timeframe.

CONCLUSIONS:

1. If the applicant complies with all the requirements under both King County and City regulations for sanitary sewer, domestic drinking water, stormwater control systems and access improvements the proposed plat appears to serve the public use and interest. In this case, things are complicated by the applicant's reliance on older King County regulations with the overlay in some instances of City requirements such as impact fees. While the applicant is entitled to protection, as it were, of older regulations that vest certain standards, that does not mean a plat which might exacerbate flooding problems can escape appropriate review. Whether one calls them environmental mitigation or making sure the plat provides for and accommodates the potential negative effects of its development, a plat can only be approved if the applicant submits a plat with appropriate features. There are different standards that apply to development. Some such as density, lot size, lot width and depth, building height and setbacks could be considered aesthetic. These factors determine how spacious lots are, the separation between homes, how large homes can be, aspects of development that are termed bulk standards. Then there are other standards that affect public safety or protect from property damage - stormwater control, erosion control, fireflow and safe drinking water and sanitary sewers. Then there are factors that might be considered a combination of aesthetics and safety - road width, sidewalks and street lighting. A paved street provides access for residents but it also needs to provide a safe durable and wide enough surface to allow emergency vehicles access without getting bogged down in mud or hampered by parked cars (safety) besides cutting down on dust and runoff (aesthetic).
2. In other words, this plat must provide appropriate stormwater controls. A report commissioned by this applicant specifically identified controls from the 2005 Design Manual. The applicant apparently chose a report that dealt with three projects and together the projects' impacts were reviewed and analyzed. There is no way to pull out or tease from these reports the separate measures that this applicant now expects to use, older, potentially less stringent measures, from those found in these reports. The reports specifically identified measures to assure that downstream flooding, flooding that affects roads, driveways and ponds on third-party property, is not worsened. The critical issue is that this plat cannot be approved if flooding might be exacerbated. This plat cannot be approved if it does not serve the public use and interest. This plat is held to the standards enunciated in the two McCarthy reports. The stormwater record and public use and interest is based on following those recommendations. The City Council should not approve this plat if those measures are not followed. The newer 2005 Manual reflects changes that overcome weaknesses, flaws or limitations in the older standards. The newer standards must be followed.
3. Similarly, as discussed in the companion Appeal portion of this report, sedimentation occurs when erosion occurs. Flooding problems associated with clearing nearly eight acres will be accompanied by erosion. Erosion should be controlled by the most modern methods of control. Those are contained in the Department of Ecology's most recent manuals. The applicant's plat cannot serve the public use and interest if wetlands are jeopardized by flooding which is accompanied by erosion.
4. The best management practices need to be applied to this project or it will not serve the public use and interest. Again, things like lot sizes and building heights and bulk change in response to market demands, density preferences and aesthetics. But current knowledge of flooding and erosion and how to best handle them are very different issues. Life safety and the functioning of wetlands are critical issues that need to be properly addressed. This plat can only be approved if those consequences are appropriately solved.
5. Staff reviewed traffic for the proposal and determined that under King County regulations as well as the need for two points of entry, that traffic safety would be addressed by connecting a through street from east to west from 162nd to 164th. That appears appropriate. It provides better access for residents and

certainly better access for both police and fire services. Separately, the applicant has entered into an agreement with two other proposed plats in the area for joint development of access road 162nd. Whether those agreements come to fruition or how they are timed will not eliminate the need for the access if this plat were to be occupied. Therefore, in order to approve this plat the appropriate roads that connect this plat with surrounding arterials will be required prior to sale or occupancy.

6. The proposal does appear to otherwise satisfy the bulk standards such as lot size, width and density required. It meets the tree schedules required. It will be protecting the natural areas if stormwater and erosion are appropriately handled.
7. The development of the subject site is appropriate given the Comprehensive Plan's objectives and the appropriate Zoning Code. The development will increase the tax base of the City. The new lots will provide additional housing choices for new residents and will protect the valuable amenities on the subject site.
8. There is no doubt that developing an eight acreage site that has been forested and undisturbed in the main will change the character of the site and the surrounding community. These changes were clearly anticipated when the Comprehensive Plan and Zoning were adopted for the area and this site in particular. There will be more traffic and more comings and goings by new residents. Housing for new residents is a vital part of any planning process and changes result when property is finally developed.
9. In conclusion, the City Council should approve the proposed 36-lot plat subject to the conditions noted below.

RECOMMENDATION:

The City Council should approve the 36-lot Preliminary Plat subject to the following conditions:

1. The applicant will be required to submit a Temporary Erosion and Sedimentation Control Plan (TESCP) designed pursuant to State Department of Ecology's Erosion and Sediment Control Requirements, outlined in Volume II of the 2001 Stormwater Management Manual. The plan must be submitted to and approved by the Development Services Division Plan Review staff prior to issuance of the utility construction and during utility and road construction.
2. The detention system for this project shall be required to comply with the requirements found in the 2005 King County Surface Water Design Manual to meet both detention (Conservation Flow control - a.k.a. Level 3) and water quality improvements."
3. The applicant shall comply with the conditions imposed by the ERC as modified in the appeal decision
4. The applicant shall provide an east/west road connection from 162nd Ave SE to 164th Ave SE in order to create highly connective road network. All construction and upgrading of public and private roads shall be done in accordance with the King County Road Standards established and adopted by Ordinance No. 11187 as amended (1993 KCRS).
5. The applicant shall be required to submit a revised plat plan, depicting an east/west road connection from 162nd Ave SE to 164th Ave SE, which is also consistent with all preliminary plat review criteria. The revised plat plan shall be submitted for review and approval by the

Development Services Division and the Current Planning Project Manager, prior to engineering plan approval.

6. Both frontages, 162nd Ave SE and 164th Ave SE, for the full length of the property shall be improved to the satisfaction of the City of Renton Development Services Division subject to the King County Road Standards or as modified by variance. 162nd Ave SE shall be designed and constructed to meet the urban neighborhood collector standard. No lot shall have a driveway entering off 162nd Ave SE or 164th Ave SE.
7. The applicant shall create pedestrian paths and links as determined by Staff.
8. The Applicant shall be required to provide a detailed tree retention plan with the engineering review application. The tree retention plan shall be reviewed and approved by the Current Planning Project Manager prior to engineering permit approval.
9. The applicant shall pay a Transportation Mitigation Fee based on \$75.00 per net new average daily trip attributed to the project. The fee for the proposed plat is estimated at \$25,839.00 (\$75.00 x 9.57 trips x 36 lots = \$25,839.00) and is payable to the City prior to the recording of the final plat.
10. The applicant shall establish a homeowners' association for the development, which would be responsible for any common improvements and/or tracts within the plat prior to final plat recording.
11. The applicant shall pay school impact fees per RMC 4-1-160, D, to the City of Renton, on behalf of the Issaquah School District. The fee for the proposed plat is estimated at \$216,756.00 (\$6,021.00 x 36 lots = \$216,756.00).

The hearing reopened on Tuesday, March 17, 2009, at 1:35 p.m..

Liberty Gardens Preliminary Plat Appeal
LUA 08-093

Appellant: Hans Korve
Ann Nielsen: Representing the City of Renton

Ann Nielsen stated the appeal has been modified. The issues before the Examiner today are in Subsection B, 1, 4 and 5, those are the three remaining issues.

The following Exhibits were entered:

<u>Exhibit No. A:</u> Appeal Timeline	<u>Exhibit No. B:</u> Vicinity Map
<u>Exhibit No. C:</u> Preliminary Plat Plan	<u>Exhibit No. D:</u> Drainage Plan (2008)
<u>Exhibit No. E:</u> Aerial Photo	<u>Exhibit No. F:</u> Topography Map

<u>Exhibit No. G:</u> Plat Plan (March 16, 2008)	<u>Exhibit No. H:</u> Revised Appeal Letter

Hans Korve stated that items 1, 4 and 5 are the only items they are dealing with.

No. 1 deals with the use of the DOE manual for stormwater and erosion control. They are vested to the King County 1998 Manual for erosion control. There was nothing in the environmental study that showed that the vested document was insufficient. Where there is an acceptable level of service, in the case of the 1998 manual, temporary erosion control is very well covered. There is nothing unique about this site, there is nothing in the environmental review document produced by the City indicating that there is anything unique and special about this site that would require using the 2001 DOE manual to remedy. Part of staff's original presentation was that they would need an MPDES Permit which would supersede what is happening at the site. DOE would be monitoring the site during the development. They would like to have the vested documents apply to the project. Using SEPA to undo vested rights seems to be wrong.

No. 4 regards the maintenance and surety devices which is the driving force behind the appeal. King County code clearly allows bonding. He did not know if this was a policy statement as opposed to a development regulation by staff, they feel that the King County Code allows for bonding and they would like to be allowed to bond as per King County Code. There are no probable adverse environmental impacts that would justify the removal bonding as a viable means of taking care of maintenance, surety and performance issues with the plat. There was no discussion of this adverse environmental impact in the environmental study produced by the City. SEPA requires identification of the environmental impact and then show the mitigation. This issue was not covered.

No. 5 covers the use of the King County manual. The appellant's engineer pointed out that the 1998 vs. 2005 manual are virtually the same in a forested condition. He agrees to that, the point remains that the use of SEPA to undo the vested rights is not appropriate. There would be no adverse harm is using the 1998 manual, they are virtually the same. The drainage facilities would be designed to the 1998 manual, King County acknowledges the 1998 manual more than sufficient to address the environmental impacts and it is also covered in the King County staff report, page 4 states that the drainage issues will be addressed through Level III flow control of the 1998 manual.

Ann Nielsen stated that as previously stated prior to the Preliminary Plat hearing, she would like to have incorporated the relevant portions of the facts and testimony that were given. She would be relying on the information that was given during the Preliminary Plat stage and that they be incorporated into the Appeal hearing for purposes of factual testimony and evidence for the appeal. She would present a summary to wrap up the Appeal hearing.

Regarding the surety issue, the City does concede that the appellant is clearly vested to the King County Development Standards, however, they have always maintained the position that it is the procedural roles of the City of Renton that apply here. With respect to the surety devices, the King County code speaks to financial guarantee. Mr. Korve is relying on these particular provisions to request that they be considered a bond as proposed to the satisfied surety, which is more in line with what the City of Renton requires. This is a procedural issue, there is nothing in the King County Code provisions that would lend itself to being a development code and as such the City would submit that as a procedural aspect of this should be compelled to submit to the City of Renton procedures. It was her understanding that there is a City of Renton ordinance that specifically requires a set aside or surety in lieu of a bond.

The difference between the two is that cash is set aside in a bond and not available to the developer as opposed to getting a bond from a bonding company where you pay 3% of a million dollars, so they are only out the 3%, it's like buying an insurance policy.

Regardless of what the times are, it has been the City's policy to require a surety device, which has been through years of experience where a bond has been found to be insufficient. The nature of this particular plat is such that there is going to be a higher level of environmental concerns and the issue of a five year monitoring of the wetland versus three years. There is a higher level of environmental concern here, as a result this was tied into a SEPA condition, and this is purely a procedural issue and they would ask the Examiner to render a decision with that information in mind.

There was discussion between Ms. Nielsen and The Examiner as to whether this matter was truly a SEPA condition or purely a procedural issue and how it should be handled.

In the environmental checklist that was submitted, the 10/13/2005 report, it talks about proposed measures to reduce or control surface, ground and runoff water impact, if any. A further section reads; A Level I drainage analysis prepared by DMP engineering and a Level III drainage report prepared by Ed McCarthy are available for review. These reports analyzed the required onsite detention requirements as well as analyzing the downstream drainage basin. The stormwater detention manual requires that the project engineer analyze impacts to downstream drainage systems and make recommendations with respect to any proposed measures to improve offsite drainage. The last sentence reads: please review the drainage reports for any potential required measures to help reduce or control surface water impacts.

Ms. Nielsen continued to read from the McCarthy report regarding roadway flooding along SE 144th which was considered to be a severe flooding problem according to King County Standards. Between the intersection of 162nd Ave SE and 160th Ave SE the driveway culverts along the ditch to the north side of SE 144th Street, would cause the north side of SE 144th street to become overtopped posing a threat of unpaved access due to driveway edges. This would cause an unsafe condition. There are several drainage issues emanating from this development.

There are broader options in the 2005 manual and they are more consistent with the NPDES regulations. It further indicates that the City generally in the east plateau area has consistently used the 2005 manual. Given the particular nature of this project, the lower manual that they are vested to does not adequately address the specific environmental issues that are unique to this particular site.

She asked that the Hearing Examiner to focus on the testimony and evidence that was presented by Mr. Watts to show that this particular site has specific unique environmental impacts that necessitate the mitigated conditions that were proposed, namely the elevation of the 1998 stormwater manual to 2005 standard along with the erosion control manual up to DOE standards.

Mr. Korve stated that staff has brought up the King County Staff Report and King County Findings and yet ignored or discounted the actual report as it was presented to the Examiner that they believe the 1998 manual was more than enough to address the issues, it was in their MDNS and in the staff report. The concerns of the community are valid and important, that is not a justification for imposing a SEPA condition, the City is required to indicate in their Environmental Review what the issues are, how they are adverse and significant and then how this proposed condition mitigates that.

The simple statement that this is a site with wetlands is not a compelling argument for circumventing applicable code, many sites and King County and Renton have wetlands, there is nothing unique and special about this one. The NPDES that they are required to adhere to as part of the stormwater controls is beyond City regulations it

goes to State and National regulations that are used in implementing the National Pollution Stormwater controls. Those items of stormwater control will be addressed through the NPDES process, DOE will have monitoring crews out, there is a person assigned to the site who will be available at all times.

The Examiner stated that the issue appears to be whether they want to come back and try policing after the erosion has occurred or make sure that the project complies with current standards that address the problem. However, this plat must pass muster today, he must make a recommendation to the Council that with the mitigation measures imposed by the ERC are addressed and covered appropriately. Stormwater and erosion control are met by this plat and will not exacerbate problems.

Mr. Korve stated that these issues are not actually the main issues of their appeal. The key issue is the surety, a financial situation. It is in the King County code, it is an adopted ordinance and is part of their development regulations, there whole section on wetlands and how to mitigate and how to assure that wetlands are mitigated, maintained and monitored refers to Section 27a, which is the surety section; that is not a policy statement, it is a Code.

The Examiner stated that he did not know if the Courts had established what vesting covers, it usually is density, zoning, yards and things like that. He did not know if it deals with monetary issues or not. He may ask the City Attorney for clarification in this matter. He is not sure it is an issue he can decide

The **Examiner** called for further testimony regarding this project. There was no one else wishing to speak, and no further comments from staff. The hearing closed at 2:10 p.m.

FINDINGS, CONCLUSIONS & RECOMMENDATION

Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. The appellant, Hans A. Korve, filed an appeal of an environmental determination issued by the City on December 15, 2008.
2. The appeal was filed in a timely manner.
3. The appellant is Planning Manager for a proposed plat known as Liberty Gardens. The plat would divide approximately 8.95 acres into 36 lots for the eventual development of detached single family homes.
4. The subject site is located east of 162nd Avenue SE and north of SE 144th Street.
5. The subject site was annexed to the City on August 11, 2008 by Ordinance 5398. Prior to annexation the property was under the jurisdiction of King County.
6. Just prior to the Public Hearing the appellant amended their appeal and limited the appeal issues to three primary issues. The ERC imposed six conditions in its Mitigated Determination of Non-Significance. The appellant ultimately challenged three of those conditions. The challenged conditions, numbered per the original determination, are:

- "1. The applicant will be required to submit a Temporary Erosion

and Sedimentation Control Plan (TESCP) designed pursuant to State Department of Ecology's Erosion and Sediment Control Requirements, outlined in Volume II of the 2001 Stormwater Management Manual. The plan must be submitted to and approved by the Development Services Division Plan Review staff prior to issuance of the utility construction and during utility and road construction.

4. The applicant shall provide a maintenance surety device (*a letter of credit or irrevocable set aside letter*) (italics in original), prior to plat recording, set at an amount totaling 125% of the cost, to guarantee satisfactory performance of the mitigation plan for a minimum of five years.
5. The detention system for this project shall be required to comply with the requirements found in the 2005 King County Surface Water Design Manual to meet both detention (Conservation Flow control - a.k.a. Level 3) and water quality improvements."
7. A major contention of the appellant is that this project was initiated when the property was located in King County and that the appellant is entitled to develop the subject site under land use rules and regulations that were in effect when the application was submitted. The application was submitted on December 29, 2004.
8. The appellant also maintains that SEPA, specifically, RCW 43.21C.240 prohibits the imposition of SEPA mitigation conditions if the impacts generated by the project are already addressed by existing regulations.

"Furthermore, Subsection (4) A states that a development regulation shall be considered to adequately address an impact if the municipality, through the planning and environmental review process under Chapter 36.70A RCW and this chapter, has identified the specific adverse environmental impacts and :

'(b) The legislative body of the municipality has designated as acceptable certain levels of service or development standards required or allowed by chapter 36.70A RCW'"
9. The appellant argued that the King County 1998 Storm Water Design Manual provided applicable standards for both stormwater mitigation as well as erosion control measures. Those were the standards applicable to stormwater and erosion when the proposal was submitted on December 29, 2004 under which the appellant argues they are vested.
10. Finally, the appellants argue that the manner in which the ERC imposed financial guarantees to assure the proposed wetland and buffer mitigation improvements were accomplished did not include methods permitted by the King County Code, namely bonding. The claim is the appellant is vested in this method or, at least, can avail themselves of this method.
11. A downstream drainage analysis was prepared for the appellant's project as well as two nearby parcels.

The three projects are Threadgill, Cavella and Liberty Gardens, the appellant's project. The analysis is titled "*SE 144th Street Level 3 Downstream Drainage Analysis*" (Ed McCarthy, June 15, 2007).

12. The Cover Page of the SE 144th Street Level 3 Downstream Drainage Analysis, hereinafter Analysis includes the following text:

"Prepared for: Mr. Dave Petrie
811 So. 273rd Ct.
Des Moines, WA 98198."

13. Page 1-1 states:

"The conveyance route is downstream from three proposed single-family residential developments that are current under drainage review at King County DDES. These developments include Threadgill Plat, Liberty Gardens, and Cavella." (emphasis supplied)

Page 2-8 SE 144th Street Level 3 Downstream Drainage Analysis (Ed McCarthy, June 15, 2007):

"Roadway flooding along SE 144th Street would be considered as 'severe roadway flooding problem' (enclosed in quotes in original) according to King County standards (King County Department of Natural Resources, January 2005) due to the following conditions:

Between the intersections of 162nd Avenue SE and 160th Avenue SE driveway culverts along the ditch on the north side of SE 144th Street would become overtopped, posing a threat of unsafe access due to indiscernible driveway edges.

Floodwater over the driveways on the north side of SE 144th Street between 160th Avenue SE and CB-11A would be deeper than 0.5 foot posing a severe impediment to emergency vehicle access."

14. Driveways, according to the report, would be overtopped by 0.7 feet. The report also indicates that overflow from catch basins is conveyed to the west in the north side of the roadway until it reaches low lying private property where it settles. Neighbors reported this property does get flooded.
15. Ed McCarthy submitted a letter or report to King County DDES on March 3, 2008. It was intended as a follow up to his initial report with suggested mitigation measures. It states in its opening paragraph:

"The results of the hydraulic assessment I prepared for the downstream conveyance system (June 15, 2007) predicted flooding along the north side of SE 144th Street and at the intersection of 160th Avenue SE. There has also been residential flooding at SE 142nd Place, which is adjacent and tributary to the downstream system of the proposed developments. After consideration of the basin and downstream conditions, I offer the stormwater mitigations described below for the proposed plat to address existing flooding problems along SE 144th Street and at the end of SE 142nd Place."

16. He then describes conditions that could aggravate "an existing severe flooding problem." (Page 2, Para

1) Continuing at Paragraph 2:

"On the other hand, adopting Level 3 flow control would mitigate impacts of the projects on this downstream flooding area. The predicted 100-year stage in the downstream flood flow path would not be increased. In light of the downstream conditions, providing Level 3 detention standards is an appropriate stormwater mitigation for each of the proposed developments." Paragraph 3 contains the following statement: "These estimated volumes do not include a factor of safety which would increase the required volumes..."

17. His letter concludes with this text "Please note that the applicants for the proposed plats willingly offer the mitigations that would benefit the property owners along SE 142nd Place provided that the mitigations can be designed and implemented without incurring unreasonable delays that may be confronted in acquiring construction easements, permits, or other construction-related authorizations."
18. There had been an earlier determination by the ERC and an appeal was filed by neighbors of that determination. The City rescinded that decision and the appeals were voided at that time. Therefore, no part of this decision is directed at the earlier determination or appeal.

CONCLUSIONS:

1. The decision of the governmental agency acting as the responsible official is entitled to substantial weight. Therefore, the determination of the Environmental Review Committee (ERC), the city's responsible official, is entitled to be maintained unless the appellant clearly demonstrates that the determination was in error.
 2. The Determination of Non-Significance in this case is entitled to substantial weight and will not be reversed or modified unless it can be found that the decision is "clearly erroneous." (Hayden v. Port Townsend, 93 Wn 2d 870, 880; 1980). The court in citing Norway Hill Preservation and Protection Association v. King County Council, 87 Wn 2d 267, 274; 1976, stated: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."
- Therefore, the determination of the ERC including conditions it found necessary to mitigate the impacts of the development on City services and facilities will not be modified or reversed if it can meet the above test. For reasons enumerated below, the decision of the ERC is affirmed in part and reversed in part.
3. The clearly erroneous test has generally been applied when an action results in a DNS since the test is less demanding on the appellant. The reason is that SEPA requires a thorough examination of the environmental consequences of an action. The courts have, therefore, made it easier to reverse a DNS. A second test, the "arbitrary and capricious" test is generally applied when a determination of significance (DS) is issued. In this second test an appellant would have to show that the decision clearly flies in the face of reason since a DS is more protective of the environment since it results in the preparation of a full disclosure document, an Environmental Impact Statement.
 4. An action is determined to have a significant adverse impact on the quality of the environment if more than a moderate impact on the quality of the environment is a reasonable probability. (Norway, at 278). Since the Court spoke in Norway, WAC 197-11-794 has been adopted, it defines "significant" as follows:

Significant. (1) "Significant" as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.

(2) Significance involves context and intensity ...Intensity depends on the magnitude and duration of an impact.... The severity of the impact should be weighed along with the likelihood of its occurrence. An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred.

5. Also redefined since the Norway decision was the term "probable."

Probable. "Probable" means likely or reasonably likely to occur, ... Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. (WAC 197-11-782).

6. Impacts also include reasonably related and foreseeable direct and indirect impacts including short-term and long-term effects. (WAC 197-11-060(4)(c)). Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as precedent for future actions. (WAC 197-11-060(4)(d)). In the current case, the Drainage Report and Mitigation letter specifically refers to the 2005 Design Manual. Page references are to the manual. Real flooding occurs under existing conditions and would increase with this development.
7. The appellant maintains that the King County standards that were applicable to this project when it was submitted on December 29, 2004 are controlling under the vested rights doctrine. This office has to disagree. The appellant is correct when it comes to certain aspects of review. At the same time, the ERC is entitled to review the record including evidence of flooding and potential mitigation measures. The ERC is especially permitted to rely on documents and reports submitted by the appellant or appellant's representatives. The report and mitigation documents submitted by the appellant or on behalf of the appellant recommend Level 3 of the 2005 King County Manual. While those documents may not have acknowledged or distinguished the appellant's vested rights, they appear to recommend the most appropriate method of dealing with stormwater where critical, life-safety issues were identified or where property rights were affected. The appellant and other property owners apparently chose the combined report for three projects, Threadgill, Cavella, and the appellant's own Liberty Gardens. Each developer submitted applications at a different time and potentially vested in different requirements. The appellant's consultant did not distinguish the different projects or their different submission dates. Rather the review suggested appropriate measures that would not exacerbate stormwater issues that resulted in overtopped culverts, flooded driveways and ponding on private property.
8. So whether one looks at whether or not vested rights guarantees the application of old standards or whether or not King County Code takes precedence over SEPA review, there is no escaping that the recommendations submitted on behalf of the appellant recommend the imposition of Level 3 conditions -2005 Manual. The ERC properly considered this evidence and the appellant failed to demonstrate that the reliance on the reports was clearly erroneous.
9. Again, the appellant invited the ERC to make the decision they did by presenting the City with the two documents by McCarthy. One was the Level 3 drainage analysis and then his proposed mitigation measures. Those documents indicated that flooding and/or ponding of water occurs and could be exacerbated by the new development. Yes, the report is based on three (3) separate projects and those projects may be subject to separate code standards under certain "vesting doctrines" but this applicant

chose the route of a consolidated report and it is that report that suggested the newer standards were appropriate to avoid creating additional stormwater problems in this area. So, back to a basic environmental question - would the development of this project cause more than a probable impact on the quality of the environment? If so, are there appropriate mitigations measures that can avoid those impacts? The first question is answered by reports that suggest that flooding is already an issue and it would likely be exacerbated by this project. Can those impacts be mitigated? Apparently, the reports suggest that following the newest standards would avoid further harm to the area.

10. Now, does the fact that flooding was identified as a problem that imposing of newer standards would mitigate those problems mean that the newer erosion control standards of the 2001 DOE Manual are also appropriate? Or would the older standards be sufficient. It would appear that stormwater flooding would more probably than not sluice materials in any drainage course and also on surfaces. Clearing the property as generally proposed and removing the heavy vegetative cover that exists was expected to increase flooding. It seems that such deforestation would also increase erosional impacts. The newer standards are designed to protect stream and wetland areas from sediment. Unlike certain bulk standards that are mainly directed as aesthetic qualities where vesting does not generally invite additional harm, stormwater and by extension erosion standards address harmful conditions that more current knowledge was intended to address. This office believes that the ERC properly applied the newer 2001 DOE Manual's standards to address real problems with erosion.
11. This leaves the final issue, the appropriateness of the method imposed to guarantee the proposed wetland and buffer mitigation improvements. This office understands that there are financial consequences to how wetland mitigation is financed but there does not seem to be a tenable link between the method of financing the guarantees and the environmental outcome. Additionally, this condition seems one that is already regulated by Code and one that the ERC, itself, might not need to address. This office finds little relationship between the method of guaranteeing, bonding, letter of credit or what have you, a mitigation measure and the impact to be mitigated. Clearly, the mitigation required needs to be accomplished or the project would fail to pass environmental review creating untoward unmitigated environmental impacts. But that does not mean the ERC has a right to impose a specific manner of accomplishing the guarantee. The fact that this office has agreed that Condition #4 is an inappropriate SEPA mitigation measure does not mean that the City does not have the ability to require the same manner of guarantee to accomplish the same environmental result under its other ordinances. This office does not rule on the vesting principle in resolving this issue in the appellant's favor as a matter of SEPA review. Condition Number 4 was erroneously imposed by the ERC and is reversed.
12. The reviewing body should not substitute its judgment for that of the original body with expertise in the matter, unless the reviewing body has the firm conviction that a mistake has been made. This office was not left with a firm conviction that the ERC made a mistake. This office finds the ERC appropriately reviewed the stormwater documents and appropriately applied the mitigation measures suggested by those documents. No reasons were advanced to suggest this office reverse that decision or substitute another judgment. On the other hand, Condition Number 4 seems an inappropriate decision to backup up the appropriate decision requiring wetland mitigation itself.
13. The appealing party has a burden of demonstrating error and that was only partially met in the instant case.

DECISION:

The decision of the ERC is affirmed in part and reversed in part.

Conditions 1 and 5 are affirmed.

Condition 4 is reversed and removed from the determination.

ORDERED THIS 28th day of April 2009.

FRED J. KAUFMAN
HEARING EXAMINER

TRANSMITTED THIS 28th day of April, 2009 to the following:

Mayor Denis Law	Dave Pargas, Fire
Jay Covington, Chief Administrative Officer	Larry Meckling, Building Official
Julia Medzegian, Council Liaison	Planning Commission
Gregg Zimmerman, PBPW Administrator	Transportation Division
Alex Pietsch, Economic Development	Utilities Division
Jennifer Henning, Development Services	Neil Watts, Development Services
Stacy Tucker, Development Services	Janet Conklin, Development Services
Marty Wine, Assistant CAO	Renton Reporter

Pursuant to Title IV, Chapter 8, Section 100G of the City's Code, **request for reconsideration must be filed in writing on or before 5:00 p.m., May 12, 2009.** Any aggrieved person feeling that the decision of the Examiner is ambiguous or based on erroneous procedure, errors of law or fact, error in judgment, or the discovery of new evidence which could not be reasonably available at the prior hearing may make a written request for a review by the Examiner within fourteen (14) days from the date of the Examiner's decision. This request shall set forth the specific ambiguities or errors discovered by such appellant, and the Examiner may, after review of the record, take further action as he deems proper.

An appeal to the City Council is governed by Title IV, Chapter 8, Section 110, which requires that such appeal be filed with the City Clerk, accompanying a filing fee of \$75.00 and meeting other specified requirements. Copies of this ordinance are available for inspection or purchase in the Finance Department, first floor of City Hall. **An appeal must be filed in writing on or before 5:00 p.m., May 12, 2009.**

If the Examiner's Recommendation or Decision contains the requirement for Restrictive Covenants, the executed Covenants will be required prior to approval by City Council or final processing of the file. You may contact this office for information on formatting covenants.

The Appearance of Fairness Doctrine provides that no ex parte (private one-on-one) communications may occur concerning pending land use decisions. This means that parties to a land use decision may not communicate in private with any decision-maker concerning the proposal. Decision-makers in the land use process include both the Hearing Examiner and members of the City Council.

All communications concerning the proposal must be made in public. This public communication permits all interested parties to know the contents of the communication and would allow them to openly rebut the evidence. Any violation of this doctrine would result in the invalidation of the request by the Court.

Liberty Gardens Preliminary Plat/Appeal
File No.: LUA-08-093, PP, ECF
April 28, 2009
Page 24

The Doctrine applies not only to the initial public hearing but to all Requests for Reconsideration as well as Appeals to the City Council.